

MOUNTAIN BECOMES VALLEY: HAS THE PRACTICE OF MOUNTAINTOP MINING BEEN LEVELED?: *OHIO VALLEY ENVIRONMENTAL COALITION V. BULEN*, No. 3:03–2281, 2004 U.S. DIST. LEXIS 12690 (S.D. W. VA. JULY 8, 2004)

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I. INTRODUCTION

How many mountains must be flattened and valleys must be filled before the practice of mountaintop mining is put to a stop? Many residents of West Virginia have been pondering this question since the first mountaintop mining operation began destroying the landscape of the state in the late 1960s.¹ On July 8, 2004, the Southern District of West Virginia took a step toward the answer with its decision in *Ohio Valley Environmental Coalition v. Bulen*² (*Ohio Valley*). Federal authorization to conduct mountaintop removal and valley fill operations became significantly more difficult to achieve when the court found general nationwide permit 21 (NWP 21),³ relied on by mining companies, violated the Clean Water Act (CWA).⁴

Issuance of general NWP 21, as a final agency action subject to judicial review, results in greater than “minimal adverse environmental effects”⁵ and therefore violates the clear intent of the general permitting provision of the CWA. This Note will analyze the *Ohio Valley* court’s holding and illustrate how it laid the foundation for this stronger statement of the law under NWP 21. Section II of this Note will explore the statutory law pertaining to the authorization of mountaintop removal mining projects pursuant to NWP 21 and examine the

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1. Penny Loeb, *Shear Madness*, U.S. NEWS & WORLD REPORT, Aug. 11, 1997, at 26, 32.
2. *Ohio Valley Env'tl. Coalition v. Bulen*, No. 3:03–2281, 2004 U.S. Dist. LEXIS 12690 (S.D. W. Va. July 8, 2004).
3. Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002).
4. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *42 (citing the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000)).
5. 33 U.S.C. § 1344(e)(1).

relevant case law before the *Ohio Valley* decision. Section III will examine the *Ohio Valley* case and the context of the decision bringing to light the extent of the court's holding as applied to NWP 21. In Section IV, the rationale of the *Ohio Valley* court will be analyzed on two levels: (1) the issuance of NWP 21 as a final agency action, and (2) the court's finding that NWP 21 was contrary to the concept of general permitting under the Clean Water Act.⁶

II. BACKGROUND

The frequently stated goal of the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"⁷ has been twisted in many ways to justify activities in the waters of the United States. The CWA, along with the Surface Mining Control and Reclamation Act of 1977⁸ (SMCRA), makes up the bulk of legislation covering authorization of mining projects in the United States.⁹ Section 702 of the SMCRA makes clear that where the CWA applies to the mining process, the SMCRA does not supercede its provisions.¹⁰ The CWA likewise provides that it "shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with [the CWA]."¹¹ The CWA, while sharing authority with the SMCRA, plays a much stronger role in regulating mountaintop mining as the technique is practiced today. In order to understand why, the basic process of mountaintop mining must be explained.

A. The Process of Mountaintop Mining

Horizontal seams (or layers) of coal are sometimes found layered in mountains such as those in West Virginia, Southeastern Kentucky, and Southwestern Virginia.¹² To extract the coal, mining companies remove the rock and soil layered over the coal, place this mixture in an adjacent valley, then

6. *Ohio Valley Emtl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *42.

7. 33 U.S.C. § 1251(a).

8. 30 U.S.C. § 1292(a) (2000).

9. Brian Peterson, *Confusion in Regulating Coal Mine Water Pollution: Regulatory Overlap in SMCRA and the CWA*, 99 W. VA. L. REV. 595, 597 (1997).

10. Peterson, *supra* note 9, at 603; *See also* Robert E. Beck, *Water and Coal Mining in Appalachia: Applying the Surface Mining Control and Reclamation Act of 1977 and the Clean Water Act*, 106 W. VA. L. REV. 629, 703-04 (2004).

11. 33 U.S.C. § 1371(a).

12. Loeb, *supra* note 1, at 28.

replace the rock and soil after the coal has been extracted.¹³ If all of the rock could fit in the space from which it was extracted, mountaintop mining might not be such a harmful practice, but due to the natural swelling of materials when they are disturbed from their natural state, a significant portion of the “overburden”¹⁴ remains in the valleys adjacent to the rebuilt mountain.¹⁵ Many of these “valley fills”¹⁶ bury intermittent and perennial streams and drainage areas that are near the mountaintop.¹⁷ As of 1997, over 100 miles of streambed in the above-mentioned region has been buried by this process.¹⁸

B. The Statutory Provisions Regulating Mountaintop Mining

Section 301 of the CWA provides that “the discharge of any pollutant by any person shall be unlawful.”¹⁹ Rock and sand, two of the potential remainders of a mountaintop mining operation, are both included in the definition of “pollutant” found in the CWA, making the discharge of them subject to permitting under the CWA.²⁰ The important CWA provisions in the context of mountaintop coal mining are found in section 404, entitled “[p]ermits for dredged or fill material.”²¹ Section 404(e)(1) gives the U.S. Army Corps of Engineers (Corps) authority to:

[I]ssue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary [of the U.S. Army] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed

13. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001).

14. The “rock above the coal seams” which is not returned to the mountain in its entirety. *Loeb*, *supra* note 1, at 34–35.

15. *Bragg*, 248 F.3d at 286.

16. The overburden that remains in the valley after the mountain has been rebuilt. *Id.*

17. *Id.*

18. *Loeb*, *supra* note 1, at 34.

19. 33 U.S.C. § 1311(a) (2000).

20. 33 U.S.C. § 1362(6) (2000); *see also* Anne J. Castle et al., *Water Quality*, in 5 *AMERICAN LAW OF MINING* § 169.02(2)(b) (Cheryl Outerbridge ed., 2d ed. 1984).

21. 33 U.S.C. § 1344 (2000); *see also* Castle et al., *supra* note 20, § 169.02(4)(a)(i). The definitions of dredged or fill material pertaining to the CWA are given at 33 C.F.R. § 323.2 (2002). Section 323.2(c) defines dredged material as, “material that is excavated or dredged from waters of the United States.” Section 323.2(e) defines fill material as “material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of water of the United States.” 33 C.F.R. § 323.2(c), (e).

separately, and will have only minimal cumulative adverse effect on the environment.²²

These permits basically allow a person planning an activity, which will result in the discharge of a pollutant²³ into waters of the United States, to commence the activity without proceeding through the CWA's complicated permitting process.²⁴ Section 404 does, however, require that the Corps "set forth the requirements and standards which shall apply to any activity authorized by such general permit."²⁵ These so-called "nationwide permits" are good for five years from the date of issuance, and renewal may be revoked without prior notice by the Corps.²⁶ NWP 21 was issued to facilitate "[d]ischarges of dredged or fill material into waters of the U.S. associated with surface coal mining and reclamation operations."²⁷ Project authorization under NWP 21 is unique, however, because it requires that "the District Engineer must determine that the activity [at an individual project] complies with the terms and conditions of the Corps' NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing."²⁸

The purpose of the SMCRA is to "protect society and the environment from the adverse effects of surface coal mining operations."²⁹ Enacted the same year as the CWA, the SMCRA "creates a program that establishes minimum standards for permitting and reclamation of surface coal mining operations."³⁰ Some of the key performance standards set out in the SMCRA regulate the reclamation process after the resource has been extracted from the site.³¹ These reclamation standards include: (1) restoring the mined land to a state "capable of supporting the uses which it was capable of supporting prior to any mining;" (2) reconstructing the landscape to "the approximate original contour of the land;" (3)

22. 33 U.S.C. § 1344(e)(1); *see also* Castle et al., *supra* note 20, § 169.02(4)(b)(iii).

23. Under this statutory provision, 'pollutant' is typically dredged or fill material. However, 33 C.F.R. § 323.2(e)(2), lists several materials under the definition of 'fill material' that the common person would not consider to be included in that category, such as: clay, plastics, construction debris, wood chips, and of course overburden from mining or other excavation activities.

24. Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002). *See also, e.g.*, Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 297 F. Supp. 2d 74, at 76–77 (D.D.C. 2003).

25. Ohio Valley Env'tl. Coalition v. Bulen, No. 3:03–2281, 2004 U.S. Dist. LEXIS 12690, at *46 (S.D. W. Va. July 8, 2004) (citing 33 U.S.C. § 1344(e) (2000)).

26. 33 U.S.C. § 1344(e)(2).

27. Ohio Valley Env'tl. Coalition, 2004 U.S. Dist. LEXIS 12690, at *10 (quoting Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002)).

28. *Id.* at *11 (quoting Notice of Issuance of Nationwide Permits, 67 Fed. Reg. at 2090).

29. 30 U.S.C. § 1202(a) (2000).

30. Edward W. Harris, *Surface Management and Reclamation: Coal Mining*, in AMERICAN LAW OF MINING, *supra* note 20, § 172.01.

31. 30 U.S.C. § 1265 (2000); *see also* Harris, *supra* note 30, § 172.05(1).

“stabiliz[ing] and protect[ing] all surface areas;” and (4) establishing “permanent vegetative cover of the same seasonal variety native to the area.”³² The SMCRA’s performance standards contain numerous variances for unique mining operations.³³ The mountaintop removal variance states:

[A] permit without regard to the requirement to restore to approximate original contour . . . may be granted . . . where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain . . . by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining.³⁴

C. The Caselaw Leading Up To *Ohio Valley*

Other cases dealing with this subject matter have come out of this same region in the past decade. None of these previous cases came to the same conclusion as *Ohio Valley*. For instance, in *National Association of Home Builders v. United States Army Corps of Engineers*,³⁵ the United States District Court for the District of Columbia determined that the Corps’ issuance of a nationwide permit was not a “final agency action subject to review” under the Administrative Procedures Act.³⁶ The Fourth Circuit, in *Kentuckians for the Commonwealth v. Rivenburgh*,³⁷ reversed an injunction on nationwide permits created pursuant to section 404 of the CWA and found the Corps’ interpretation of section 404 entitled to *Seminole Rock* deference.³⁸

III. EXPOSITION OF THE CASE

32. 30 U.S.C. § 1265(b)(2)–(4), (19); *see also* Harris, *supra* note 30, § 172.05.

33. Harris, *supra* note 30, § 172.05(2)(a).

34. 30 U.S.C. § 1265(c)(2); *see also* 30 C.F.R. § 824 (2002) (setting out the mandatory conditions for the mining operation to qualify for the exception).

35. 297 F. Supp. 2d 74 (D.D.C. 2003) (citing 5 U.S.C. § 704 (2002)).

36. *Ohio Valley Env'tl. Coalition v. Bulen*, No. 3:03–2281, 2004 U.S. Dist. LEXIS 12690, at *76 (S.D. W. Va. July 8, 2004) (citing the Administrative Procedure Act, 5 U.S.C. § 704 (2000)).

37. 317 F.3d 425 (4th Cir. 2003).

38. *Id.* at 439 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). *Seminole Rock* deference is described by the Fourth Circuit as “binding deference to agency interpretations of their own regulations, unless ‘plainly erroneous or inconsistent with the regulation.’” *Id.*

The Ohio Valley Environmental Coalition, Coal River Mountain Watch, and the Natural Resources Defense Council, the *Ohio Valley* plaintiffs,³⁹ initially brought this suit with the goal of convincing the court to “[d]eclare that the Corps may not use mitigation plans to justify authorizing, pursuant to NWP 21, activities that will have more than minimal adverse environmental impacts on the environment” and to “enjoin [d]efendants from authorizing, pursuant to NWP 21, further disposal of mining rock, dirt or coal refuse into valley fills associated with surface mining activities or other discharges of mining wastes.”⁴⁰ Many additional, more specific requests were also attached so that the *Ohio Valley* plaintiffs’ prayer for relief was essentially asking the Southern District of West Virginia to review the NWP 21 authorization process established by the Corps.⁴¹

The plaintiffs were prepared to defend their prayer for relief by arguing “that [NWP] 21 is arbitrary and capricious because it imposes no limit on the filling of perennial streams; and that NWP 21 is arbitrary and capricious because it allows mitigation to be used to offset environmental impacts that are more than minimal.”⁴² The plaintiffs identified eleven coal-mining projects in West Virginia authorized under NWP 21 but not yet initiated.⁴³ They sought preliminary injunctive relief from the companies planning these eleven projects until the full resolution of the lawsuit.⁴⁴ The district court, after balancing the harm done to the plaintiffs with the harm suffered by a temporarily enjoined defendant, granted a preliminary injunction against the defendants⁴⁵ and the intervenors⁴⁶ on April 26,

39. The plaintiff, Ohio Valley Environmental Coalition, is a non-profit group formed in 1987 dedicated to the improvement and preservation of the environment through education, grassroots organizing and coalition building. Ohio Valley Environmental Coalition, <http://www.ohvec.org/issues/index.html> (last visited Oct. 19, 2004). The plaintiff, Natural Resources Defense Council, is the “nation’s most effective environmental action organization” using “law, science and the support of . . . members to protect the planet’s wildlife and wild places and to ensure a safe and healthy environment for all living things.” Natural Resources Defense Council, <http://www.nrdc.org/about/> (last visited Oct. 19, 2004). The mission of the plaintiff, nonprofit organization, Coal River Mountain Watch, is “to stop the destruction of . . . communities and [the] environment by mountaintop removal mining, to improve the quality of life [in those communities] and to help rebuild sustainable communities.” Coal River Mountain Watch, <http://www.crmw.net> (last visited Nov. 16, 2004).

40. Pl.’s Compl. for Declaratory and Injunctive Relief, 2003 WL 22762653 at *1 (S.D. W. Va. Apr. 18, 2003), *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690.

41. *Id.*

42. *Ohio Valley Env’tl. Coalition v. Bulen*, 315 F. Supp. 2d 821, 822 (S.D. W. Va. Apr. 26, 2004).

43. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *13.

44. *Id.*

45. William Bulen, Colonel, District Engineer, U.S. Army Corps of Engineers, Huntington District, and Robert B. Flowers, Lieutenant General, Chief of Engineers and Commander of the U.S. Army Corps of Engineers.

46. Various coal mining companies.

2004.⁴⁷ The district court found that allowing the defendants to deposit overburden would result in irreparable damage to Blue Branch, one of the effected streams, and that the “plaintiffs have established a strong likelihood of proving that [defendant’s plan of overburden disposal pursuant to NWP 21] is an illegally segmented project.”⁴⁸

On July 8, 2004, the court issued its finding that NWP 21 violated the CWA’s general permitting provision.⁴⁹ The court arrived at this conclusion through the resolution of two main issues: (1) whether the “plaintiffs’ facial challenge to the issuance of NWP 21 was ripe for judicial review;”⁵⁰ and (2) “whether NWP 21 complies with the [CWA].”⁵¹

A. The Issuance of NWP 21 Is a Final Agency Action, Ripe for Judicial Review

In order to decide whether the issuance of NWP 21 was ripe for judicial review, the *Ohio Valley* court first had to decide the sub-issue of whether the issuance of NWP 21 by the Corps was a final agency action pursuant to the Administrative Procedure Act.⁵² The court began by acknowledging the *Bennett v. Spear*⁵³ test.⁵⁴ The Supreme Court in *Bennett* provided two required conditions in order for an agency action to be considered final.⁵⁵ “First, the action must mark the consummation of the agency’s decision-making process . . . [a]nd second, the action must be one by which ‘rights or obligations have been determined,’ or

47. *Ohio Valley Env'tl. Coalition*, 315 F. Supp. 2d at 822.

48. *Id.* Nationwide permits may be combined with individual permit projects in some instances. A mining company is allowed to begin work on a portion (or segment) of such a combined project if the utility of the nationwide permit segment is not affected by the denial of a permit for the individually permitted segment of the combined project. A portion of a combined individual and nationwide permit project is illegally segmented if the mining company has begun work on that portion under NWP 21 even though the utility of that portion is dependent on the segment subject to individual permitting. Authorization by Nationwide Permit, 33 C.F.R. § 330.6(d) (2002).

49. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *40–51.

50. *Id.* at *22.

51. *Id.* at *33. The sub-issues of “whether plaintiffs have standing to bring their claims” and whether “mining companies that currently hold NWP 21 authorizations need not be joined in this lawsuit” are beyond the scope of this Casenote and will not be discussed.

52. 5 U.S.C. § 704 (2000). The Act states, “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” *Id.*

53. 520 U.S. 154 (1997).

54. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *20.

55. *Bennett*, 520 U.S. at 177.

from which ‘legal consequences will flow.’”⁵⁶ The Corps argued the plaintiffs could not challenge the issuance of NWP 21 until the nationwide permit had authorized a specific project or action that caused the plaintiffs harm.⁵⁷ The Corps relied in part upon the position adopted in *National Ass’n of Home Builders v. United States Army Corps of Engineers*.⁵⁸

In *Home Builders*, the U.S. District Court for the District of Columbia found that the agency’s action of “setting [nationwide permits] is not a final agency action subject to review.”⁵⁹ The court ruled that no legal consequences flowed directly from the *denial* of a nationwide permit. Instead, the *Home Builders* court found that “there is no final agency action until a party is either denied an individual permit or an actual enforcement action ensues.”⁶⁰ The *Ohio Valley* court pointed out that *Home Builders* did not address the situation from the point of view opposing *issuance* of a nationwide permit; *Home Builders* instead focused on “the rights and obligations of parties seeking to discharge dredged or fill materials.”⁶¹

In contrast to the *Home Builders* plaintiffs, the *Ohio Valley* plaintiffs asserted there were in fact projects, at the time of the trial, discharging overburden into waters of the United States in West Virginia under the authorization of NWP 21.⁶² At a previous hearing, the plaintiffs also expressed difficulty in obtaining information about the issuance of nationwide permits after repeated requests made to the Corps.⁶³ The plaintiffs claimed that by the time they received the information requested, ramifications of the nationwide permit authorization had already been realized.⁶⁴

The *Ohio Valley* court compared the case to *Ohio Forestry Ass’n, Inc. v. Sierra Club*⁶⁵ and adopted the Supreme Court’s three-part test, “reformulated [from] the two-part ripeness analysis [of] *Abbott Laboratories [v. Gardner]*.”⁶⁶ To determine whether the Land and Resource Management Plan at issue in *Ohio Forestry* was a final agency action, that court asked: “(1) whether delayed review

56. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *19–20 (citing Bennett, 520 U.S. at 177–78).

57. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *20.

58. 297 F. Supp. 2d 74 (D.D.C. 2003).

59. *Nat’l Ass’n of Home Builders*, 297 F. Supp. 2d at 76.

60. *Id.* at 81.

61. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *24–25.

62. *Id.* at *21.

63. *Id.* at *28.

64. *Id.*

65. 523 U.S. 726 (1998).

66. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *26 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.”⁶⁷

The *Ohio Valley* court found legal consequences of NWP 21 authorization present even before mining began because of the hardship suffered by the *Ohio Valley* plaintiffs in trying to retrieve information on the nationwide permit authorization process and the lack of effective post-authorization relief available to the *Ohio Valley* plaintiffs.⁶⁸ The *Ohio Valley* court disposed of the second element of the *Ohio Forestry* ripeness test by finding that there would be no further review or consideration of NWP 21 by the Corps before the projects in question would begin to destroy the landscape.⁶⁹ In addressing the third element, “whether the courts would benefit from further factual development of the issues presented,”⁷⁰ the *Ohio Valley* court found that NWP 21 was neither “elaborate [n]or technically based,”⁷¹ therefore, differentiating *Ohio Valley* from the unripe controversy in *Ohio Forestry*.⁷² Relying upon this ripeness test, the court concluded that the Corps’ authorization was a final agency action, and the particular complaint raised by the environmental groups was ripe for judicial review.⁷³

B. NWP 21 Is Contrary to the Intent of the CWA

To analyze whether NWP 21 complies with the CWA, the court pointed to a key feature of NWP 21 that distinguishes it from all other nationwide permits in existence under section 404 of the CWA.⁷⁴ NWP 21 is the only nationwide permit that “requires not only notification [to the Corps], but also explicit authorization by the Corps before the activity can proceed.”⁷⁵

The court began the NWP 21 validity analysis by deciding whether the legislative history of section 404(e) of the CWA⁷⁶ or the Environmental

67. *Ohio Forestry Ass’n, Inc.*, 523 U.S. at 733.

68. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *29–30 (citing *Ohio Forestry Ass’n, Inc.*, 523 U.S. at 733).

69. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *30.

70. *Id.* at *31.

71. *Id.* at *31–32.

72. *Id.* In *Ohio Forestry*, the plaintiffs were challenging the issuance of a complicated “Forest Plan” which the court determined would take “time-consuming judicial consideration of the details of an elaborate, technically based plan.” *Ohio Forestry Ass’n, Inc.*, 523 U.S. at 736.

73. *Ohio Valley Env’tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *33.

74. *Id.* at *11.

75. *Id.*

76. 33 U.S.C. § 1344(e) (2000).

Protection Agency's (EPA) interpretation of that same section must be given greater weight.⁷⁷ The court first acknowledged the common principle of great deference to Congress where Congress's intent is clear.⁷⁸ But the *Chevron*⁷⁹ rule applies; therefore, if the "statute is silent or ambiguous with respect to the specific issue," the court must address whether the agency's interpretation is a "permissible construction of the statute."⁸⁰ The *Ohio Valley* court explained three reasons why the Corps' interpretation of section 404(e) of the CWA violated the intent of Congress and was therefore impermissible: (1) the plain language of the statute; (2) the structure of the CWA; and (3) the legislative history of the CWA.⁸¹

In looking at the "plain and unambiguous" meaning of section 404(e) of the CWA, the *Ohio Valley* court determined that Congress intended for the permit to authorize only those projects that would result in "minimal adverse environmental effects."⁸² This "minimal adverse environmental effects" standard applies not on a project-by-project basis involving EPA review of the individual project's details but cumulatively "to any activity authorized by such general permit."⁸³ The *Ohio Valley* court found that issuance of NWP 21 "define[s] neither a category of activities that will cause only minimal adverse effects nor a set of requirements and standards."⁸⁴ The *Ohio Valley* court decided that the Corps' interpretation of section 404(e), allowing a project-by-project determination, gave the EPA too much discretion in authorizing specific projects under the general, nationwide permitting program.⁸⁵ This, it said, is especially so because of the lack of parameters, such as "the number of linear feet of a stream . . . that might be impacted by a valley fill," included in NWP 21.⁸⁶ The court found the Corps' NWP 21 authorization procedure contrary to the CWA's plain language because the Corps made an after-the-fact determination of "minimal adverse environmental effects."⁸⁷

77. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *40.

78. *Id.*

79. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

80. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *40-41 (citing *Chevron*, 467 U.S. 837).

81. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *43-49.

82. *Id.* at *45-46.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* The *Ohio Valley* court provided that a stipulation on the total acreage of a watershed possibly affected by a NWP 21 project would also be an example of a limiting parameter on NWP 21 projects.
Id.

87. *Id.* at *46-47.

In a brief analysis, the *Ohio Valley* court found the Corps' issuance of NWP 21 contrary to the structure of the CWA.⁸⁸ The court noted two distinct permitting sections within the CWA.⁸⁹ Section 404(a) of the CWA provides the opportunity for individual permitting, which requires an individual review by an agency, such as the Corps.⁹⁰ Section 404(e) created general permits without individual review to alleviate some of the burden placed on agencies by section 404(a).⁹¹ The *Ohio Valley* court said, "if the Corps cannot define a category of activities that will have minimal effects, absent individual review of each activity, the activities are inappropriate for general permitting."⁹² In addition, under this structure issue, the court found that Congress intended for public comment to be heard when decisions are made about a project's effect on the environment.⁹³ The Corps allowed public comment only at the issuance of NWP 21, not each time the Corps decides whether a specific authorized project has more than a "minimal adverse environmental effect."⁹⁴ For this reason too, the *Ohio Valley* court found NWP 21, as implemented by the Corps, contrary to the structure of the CWA.⁹⁵

The *Ohio Valley* court next examined the CWA's legislative history to determine whether the individual review required before individual projects are authorized under NWP 21 was contrary to Congress's intent when it enacted the CWA.⁹⁶ The court cited statements made by Senator Muskie⁹⁷ during the passage of the CWA in 1977.⁹⁸ When asked by another senator whether "the general permits . . . are intended to grant permission to conduct activities without such separate approval from the corps or a State each time that activity is to be conducted, or without any more than reasonable notice," Senator Muskie replied, "[y]es, the Senator is correct."⁹⁹ The *Ohio Valley* court found this statement made it clear that individual review of a project before authorization violated

88. *Id.* at *47–49.

89. *Id.*

90. 33 U.S.C. § 1344(a) (2000).

91. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *47.

92. *Id.* at *48.

93. *Id.*

94. *Id.* at *48–49.

95. *Id.* at 49.

96. *Id.* at *49–53.

97. Senator Muskie was recognized by the Fourth Circuit as having a valuable role in the passage of the CWA of 1977 in *Champion Int'l Corp. v. U.S. Env'tl. Prot. Agency*, 850 F.2d 182 (4th Cir. 1988). The *Champion* court stated, "Senator Muskie was the manager of the conference bill in the Senate." *Id.* at 188.

98. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *50–51.

99. *Id.* at *51.

Congress's intention in creating a general permitting process under section 404(e) of the CWA.¹⁰⁰

Having determined Congress's intent was clear, the *Ohio Valley* court found it unnecessary to investigate whether the Corps' interpretation of the CWA met the second prong of the *Chevron* test.¹⁰¹ After making these legal conclusions, the court, citing D.C. and Fourth Circuit decisions, granted the *Ohio Valley* plaintiffs' request for an injunction.¹⁰² The court, however, limited the injunction geographically to the Southern District of West Virginia.¹⁰³ The injunction not only prohibited the Corps from issuing NWP 21 authorizations in the Southern District of West Virginia, but also required the Corps to suspend projects previously authorized but not yet commenced as of July 8, 2004.¹⁰⁴

IV. ANALYSIS

The Southern District of West Virginia made its decision in *Ohio Valley* with the clearest logic and plainest interpretation of the CWA yet offered by a court on the issue of mountaintop mining in the Eastern United States. The issuance of NWP 21 pursuant to section 404(e) of the CWA is clearly a final agency action subject to judicial review. In addition, there can be no doubt that the issuance of NWP 21 is contrary to the structure of the CWA. However, the *Ohio Valley* court could have taken yet another step and found that mountaintop mining, in combination with the valley fill process, pursuant to NWP 21 results in greater than "minimal adverse environmental effects."

A. Issuance of NWP 21 Is a Final Agency Action

Ohio Valley provided a unique opportunity to the court by challenging an authorization, rather than a denial, under the CWA's general permitting program. Many section 404(e) general permit cases involve plaintiffs challenging the denial of a proposed project.¹⁰⁵ These courts have agreed that denial of a discharge

100. *Id.* at *49–53.

101. *Id.* at *53–54.

102. *Id.* at *56–57.

103. *Id.* at *57.

104. *Id.* at *57–58.

105. *See, e.g.,* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 297 F. Supp. 2d 74 (D.D.C. 2003); *Inn of Daphne, Inc. v. United States*, No. Civ.A. 97-0796-BH-S, 1998 WL 34024732 (S.D. Ala. Aug. 26, 1998); *Avella v. U.S. Army Corps of Eng'rs*, No. 89-10064-CIV-KING, 1990 WL 84499 (S.D. Fla. 1990); *Lotz Realty Co. v. United States*, 757 F. Supp. 692 (E.D. Va. 1990). *See generally* 5 U.S.C. § 704 (2000) (requiring a challenged agency action to be a "final agency action

permit under section 404(e) of the CWA is not a final agency action subject to judicial review because the potential permittee may seek individual authorization under section 401 of the CWA.¹⁰⁶ According to these decisions, the administrative means have not been exhausted until there is no other possible avenue for authorization of the proposed project. The defendant coal association in *Bragg v. Robertson*,¹⁰⁷ another Southern District of West Virginia case, even used the unchallengeable status of NWP 21 issuance in a settlement argument, seemingly accepting the available process of seeking individual permitting as an alternative.¹⁰⁸ Because it makes issuance of NWP 21 subject to judicial review, the *Ohio Valley* court's reasoning, in finding issuance of NWP 21 a final agency action, has significant implications for future CWA general permitting cases.

As the *Ohio Valley* court stated, the primary, contemporary test for determining final agency action comes from *Bennett v. Spear*¹⁰⁹ and consists of two prongs: (1) whether the "action . . . mark[s] the consummation of the agency's decision-making process," and (2) whether the action is "one by which rights or obligations have been determined, or from which legal consequences will flow."¹¹⁰ By analyzing these prongs one at a time, it becomes evident that the issuance of NWP 21 by the Corps is a final agency action.

The Corps' strongest argument that issuance of NWP 21 is not a final agency action fails under the first prong of the *Bennett* test. The Corps argued in *Ohio Valley* that because NWP 21 requires the Corps to make a secondary determination of "minimal adverse environmental impact" for each individual project, issuance of the general NWP 21 is not the consummation of the decision-making process.¹¹¹ This argument is faulty, however, because of the issuing process mandated by the CWA's corresponding regulations.¹¹² Those regulations plainly state, "[t]he Corps will give full consideration to all comments received prior to reaching a final decision [on the adoption of a NWP]."¹¹³ The only

for which there is no other adequate remedy in a court" in order to be subject to judicial review).

106. *Inn of Daphne, Inc.*, 1998 WL 34024732, at *5-6 (citing *Avella*, 1990 WL 84499; *Lotz Realty Co.*, 757 F. Supp. 692). The court in *Inn of Daphne* even goes so far as to say the plaintiff discharger, instead of filing suit under section 404, may "proceed despite the Corps' pronounced opinion that the nationwide permit would not apply and risk sanctions." *Inn of Daphne, Inc.*, 1998 WL 34024732, at *6.

107. 54 F. Supp. 2d 653 (S.D. W. Va. 1999).

108. *Bragg*, 54 F. Supp. 2d at 664.

109. 520 U.S. 154, 177-78 (1997).

110. *Ohio Valley Env'tl. Coalition v. Bulen*, No. 3:03-2281, 2004 U.S. Dist. LEXIS 12690, at *19-20 (S.D. W. Va. July 8, 2004) (citing *Bennett*, 520 U.S. 154).

111. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *20.

112. 33 U.S.C. § 1344(e)(1) (2000); see also National Permit Program, 33 C.F.R. § 330.1 (2002).

113. National Permit Program, 33 C.F.R. § 330.1(b).

opportunity for public comment regarding the issuance of NWP 21 took place prior to issuance of the nationwide permit in 2001.¹¹⁴ The public had no opportunity to comment on an NWP 21 *individual* project authorization at any time during the process.¹¹⁵ The only public comments received by the Corps on the issuance of NWP 21 relate to the nationwide permit's general parameters.¹¹⁶ Because there is no opportunity for public comment on the individual project authorizations under NWP 21 and because the regulations implementing section 404(e) of the CWA require consideration of public comment "prior to reaching a final decision," the issuance of NWP 21 is the "consummation of the agency's decision-making process" as provided for in the implementing regulations of CWA section 404(e).

The Corps would be hard-pressed to assert any argument that issuance of NWP 21 is not a final agency action due to the second prong of the *Bennett* test. The nature and goal of the nationwide permitting system facilitates quicker action by those seeking to discharge pollution into waters of the United States.¹¹⁷ NWP 21 permittees may begin the discharging activity immediately upon the secondary determination by the Corps District Engineer that the project falls within the requirements of the nationwide permit.¹¹⁸ This NWP 21 authorization timeline effectively prevents third parties from challenging the individual authorization after it has been submitted to the District Engineer.¹¹⁹ The plaintiffs in *Ohio Valley* alleged that the Corps made it even more difficult for them to challenge individual NWP 21 authorizations by "refus[ing] to give [nationwide permitting information]" to them after repeated requests.¹²⁰ The inability of a challenger to take action after the issuance of NWP 21 and before the individual project authorization, coupled with the challenger's inability to receive nationwide permit information from the Corps, makes clear that issuance of NWP 21 is an agency action "by which rights or obligations have been determined, or from which legal consequences will flow."¹²¹

114. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *27–28; Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002).

115. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *29 (emphasis added).

116. *Id.*

117. *Id.* at *9; see also 33 C.F.R. §§ 330.1(e)(1), 330.6(a)(1) (stating that a nationwide permittee may not even have to "request [from the Corps District Engineer] confirmation that an activity complies with the terms and conditions of an NWP").

118. 33 C.F.R. § 330.1(e)(1).

119. *Ohio Valley Env'tl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *29.

120. *Id.* at *28.

121. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

B. NWP 21 Violates the Purpose of the CWA

The *Ohio Valley* court made a clear holding about why NWP 21 is contrary to the CWA. The court relied upon three aspects of Congress's intent in its opinion,¹²² but additional support for the holding may also be found in the plain language of the CWA and section 404(e). Though the *Ohio Valley* court mentioned that with NWP 21 "the Corps has [not] defined . . . a category of activities that will cause only minimal adverse effects,"¹²³ the court did not discuss whether the valley-fill activities associated with the deposit of overburden caused more than a minimal adverse effect on the environment either individually or cumulatively. The court could have reinforced its conclusion by illustrating the profound, long-term effects the mountaintop mining process, authorized by NWP 21, has already had on particular valleys of West Virginia and the surrounding area.

According to the federal government's own information, "when streams are filled or mined all biota [i.e., plants, animals, and fish] living in the footprint of the fill or in the mined area are lost."¹²⁴ The footprint of just one mountaintop removal operation authorized pursuant to NWP 21 may be 300 acres or larger.¹²⁵ When these environmental effects on the waters of the United States are considered, even on an individual project-by-project basis, it is impossible to make an argument that the total destruction of all plants and animals is a minimal adverse environmental effect.

While the destruction caused by an individual NWP 21 project is devastating on a local level, the cumulative adverse environmental effects that have occurred over the past thirty years in Appalachia due to mountaintop mining are truly shocking. In 2003, the EPA conducted an environmental impact assessment in order to "evaluate options for improving agency programs . . . that will contribute to reducing the adverse environmental impacts of mountaintop mining operations and excess spoil valley fills in Appalachia."¹²⁶ The geographic scope of the assessment included not only West Virginia but also heavily mined portions of

122. *Ohio Valley Envtl. Coalition*, 2004 U.S. Dist. LEXIS 12690, at *42-53.

123. *Id.* at *46.

124. Envtl. Prot. Agency, Draft Environmental Impact Statement, III.D-2 (May 29, 2003), <http://www.epa.gov/region3/mtntop/eis.htm> [hereinafter *EPA Draft EIS*].

125. See Pending Revisions to Existing Permits with Valley Fills-Statewide (table), <http://www.osmre.gov/pdf/november2001.xls>, in Off. of Surface Mining, Dep't of Interior, November 2001 Monthly Report, West Virginia Permitting Activities (Dec. 14, 2001), available at <http://www.osmre.gov/pdf/mt121401cong.pdf>.

126. *EPA Draft EIS*, *supra* note 124, at ES-1.

Kentucky, Virginia, and Tennessee.¹²⁷ In this assessment, the EPA found a total of 6,697 valley fills were approved during the period spanning 1985 through 2001.¹²⁸ The EPA estimated that these valley fills affect the drainage of 438,472 acres of watersheds lying above the valley fills.¹²⁹ More specifically, the valley fills “directly impacted” an estimated 724 miles of stream in an area where there is “potential to impact aquatic communities some of which may be of high quality . . . support[ing] unique aquatic species.”¹³⁰

Due to the lack of guidance on what constitutes “minimal adverse environmental effects”¹³¹ in the administrative regulations and the U.S. Code, the Secretary of the U.S. Army was probably granted deference, perhaps *Chevron* deference, in the determination of whether the environmental effects of a project were minimal. Regardless, the Secretary would be hard-pressed to defend the position that the above-mentioned consequences of mountaintop mining *minimally* affect, either individually or cumulatively, the environment of West Virginia and the surrounding states. Therefore, the *Ohio Valley* court could have declared filling valleys with overburden from mountaintop mining outside the scope of section 404 of the CWA on yet another level of CWA interpretation.

The *Ohio Valley* court suggested that if NWP 21 provided more specific parameters for the Corps to evaluate before authorizing individual projects under the nationwide permit, a slightly different analysis would be appropriate.¹³² Two parameters the court suggested were: (1) the “linear feet of a stream”¹³³ to be affected by the project, and (2) the “total acreage of a watershed”¹³⁴ affected by the project. Parameters such as these, placed upon NWP 21 as limits, would facilitate greater effectiveness in the public comment period before the issuance of the nationwide permit. In addition, limitations such as those mentioned would remove some of the gray area currently present in the analysis of whether or not a mining project falls under NWP 21. Perhaps most importantly, limits on the length of stream or acreage of watershed affected by a NWP 21 mining project would further the overall goal of the CWA by providing better protection over waters of the United States.

127. *Id.* at III.A-1.

128. *Id.* at III.K-21.

129. *Id.* at III.K-38.

130. *Id.* at III.D-1, III.D-4.

131. 33 U.S.C. § 1344(e)(1) (2000).

132. *Ohio Valley Envtl. Coalition v. Bulen*, No. 3:03-2281, 2004 U.S. Dist. LEXIS 12690, at *41-42 (S.D. W. Va. July 8, 2004).

133. *Id.* at *46.

134. *Id.*

The lack of specific parameters in NWP 21 gives the Corps latitude, in addition to the *Chevron* deference already given by the courts, to push the limit of “minimal adverse environmental effects” until the phrase becomes virtually meaningless. Therefore, without parameters limiting the Corps interpretation of “minimal adverse environmental effects,” NWP 21 breaches the explicit goal of section 404(e).

V. CONCLUSION

As the effects of mountaintop mining in other federal judicial districts continue to accumulate, the sentiment that initiated the *Ohio Valley* suit will grow stronger among people affected by the destructive process. The *Ohio Valley* decision provides relief to West Virginia residents in the Southern District of West Virginia, but in doing so, sets a legal foundation for other courts to follow on the NWP 21 issue. The *Bennett* test for final agency action is applied throughout the country to citizen claims against government agencies, making the *Ohio Valley* court’s final agency action analysis applicable in nearly any NWP 21 context. In addition, the argument that NWP 21 violates the CWA and belies the purposes of section 404(e) should lead a court in the future to find that issuance of NWP 21, as a final agency action subject to judicial review, results in greater than “minimal adverse environmental effects” and therefore violates the clear intent of the CWA’s general permitting provision. This holding will send a more powerful message to mining companies practicing mountaintop removal, that in order for them to continue mining, they will have to find environmentally sound alternatives within the parameters of the CWA.